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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1941

No. 783

UNITED STATES OF AMERICA,
Petitioner,

vs.

WRIGHTWOOD DAIRY COMPANY,
Respondent.

UNITED STATES OF AMERICA,
Cross-Respondent,

vs.

WRIGHTWOOD DAIRY COMPANY,
Cross-Petitioner.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ALVIN E. STEIN,
Attorney for Cross-Petitioner.

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CROSS-PETITION.

Wrightwood Dairy Company, an Illinois corporation, defendant below and cross-petitioner herein, prays in the event a writ of certiorari on the petition of the United

States of America in the above entitled cause is granted, that a writ of certiorari issue also to review the judgment of the United States Circuit Court of Appeals, for the Seventh Circuit, entered in the above entitled cause on October 27, 1941, dismissing the cross-appeal of Wrightwood Dairy Company, cross-petitioner herein.

Opinions Below.

No opinion was rendered by the United States District Court for the Northern District of Illinois, Eastern Division. The District Court's findings of fact and conclusions of law appear in the record (R. 245-247). The opinion of the Circuit Court of Appeals (R. 270) has not yet been reported.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on October 27, 1941 (R. 275). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.[1]

1. Is Order No. 41 valid and enforcible and was it promulgated by the Secretary of Agriculture in full compliance with the law and had all conditions precedent to the effectiveness of said order occurred.

2. Does the Agricultural Marketing Agreement Act of 1937, or portions thereof not heretofore passed upon by the Supreme Court, violate Article I, Section 1 and Article I, Section 8, Paragraph 18 of the Constitution of the United States.

3. Is said Act invalid for being in conflict with the anti-trust laws of the United States and of the State of Illinois,

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[1] There may be other related questions involved in the specifications of errors hereinafter set forth (p. 6) that are also relied upon by cross-petitioner herein.

in the absence of any provision in the act exempting participants from prosecution under existing anti-trust laws.

4. Does this case present a moot question in view of the abandonment of Order No. 41 by the Secretary of Agriculture during the pendency of the cause when he amended Order No. 41 and promulgated a different order in its place.

The Statutes and Orders Involved.

The Statute involved is the Agricultural Marketing Agreement Act of 1937 approved June 3, 1937 (50 Stat. 246) (7 U. S. C. A. Sec. 601 et seq.)

Order No. 41 herein relied upon by respondent, was promulgated by the Secretary of Agriculture on August 28, 1939, effective September 1, 1939 (R. 8-22).

On June 21, 1940, during the pendency of this action below, the Secretary of Agriculture promulgated another amended order, effective July 1, 1940, in the place of said Order No. 41, which substituted order *inter alia* established a new marketing area and materially changed the various classes of persons who were subject to its provisions and reclassified milk and milk products and substituted different provisions. The amended Order did not preserve any existing rights under Order No. 41 (R. 120-141).

Statement.

Order No. 41, herein relied upon by the Government, was promulgated by the Secretary of Agriculture under the following circumstances:

The uncontradicted evidence shows that the Secretary of Agriculture gave notice of a public hearing on June 9, 1939, regarding a proposed marketing agreement and order regulating the handling of milk "prepared and proposed by the Pure Milk Association and the Chicago Milk Pro-

ducers Council, Inc.", covering the territory lying within the limits of Chicago, Illinois, and all that territory lying within the boundaries of Cook County, Du Page County, in the State of Illinois, and townships of Wheaton, Du Page, Plainfield, Lockport, Homer, Troy, New Lenox, Frankfort and Crete, in Will County, in the State of Illinois, and the townships of St. John, Ross, North Calumet, and Hobart, in Lake County, in the State of Indiana (Defs. Ex. 1, p. 28).

All of the evidence taken at the hearing was with respect to the proposed marketing agreement and the proposed marketing area therein defined.[2] No action was taken thereon, but on August 18, 1939, the Secretary of Agriculture submitted *a new and different marketing agreement or order*[3] covering a much smaller territory, namely the City of Chicago, Evanston, Wilmette, Kenilworth, Winnetka and Glencoe in the State of Illinois and containing different provisions, to *some of the producers but not all*[4] for referendum. This was done without any public hearing or notice to handlers or others.

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[2] The cross-petitioner, defendant below, introduced at the hearing defendant's Exhibits 1, 2, 3 and 4 which are admitted by the cross-respondent, plaintiff below, to constitute all of the evidence upon which the Secretary of Agriculture made his findings and fixed the terms and provisions containing the Order No. 41 (R. 201). This record has not been reprinted but has been certified to the Court in its original form.

[3] See Order No. 41 (R. 8-22) and compare with Marketing Agreement set forth and considered at public hearing defendant's Exhibit 1, p. 28, attached as appendix to Cross-petitioner's Brief in Court below.

[4] See affidavit of Mr. Connor, Referendum Agent (R. 115) and testimony of Mr. Krueger, Chief Sanitary Officer of Board of Health of City of Chicago (R. 220, 221).

In the referendum all of the producers in the area did not participate therein and said order was not approved or favored by two-thirds of all the producers in the area.[5]

The United States, cross-respondent herein, filed its complaint on December 26, 1939, to compel cross-petitioner to comply with Order No. 41 (R. 2-7). The defendant filed twelve (12) separate defenses and a counter-claim praying that the government be enjoined from enforcing Order No. 41 against cross-petitioner herein. Said defenses are fully set forth in the Record pp. 84-100, 104, 118, and for the sake of brevity are not copied herein. The United States Government, plaintiff below, filed a motion to strike defenses numbered three (3) to eleven (11), both inclusive (R. 156). The trial court overruled plaintiff's motion to strike the Third Defense and sustained the motion to strike the fourth (4th) to eleventh (11th) defenses (R. 244). A trial was had and judgment entered in favor of the defendant dismissing the complaint and granting injunctive relief against the United States under the counter-claim (R. 247-248).

The plaintiff appealed from the judgment and defendant filed its cross-appeal, No. 7620, alleging *inter alia*, that the District Court failed to find that Order No. 41 sought to be enforced against the defendant was not in compliance with the law and that all conditions precedent to the effectiveness of said order had not occurred, and that said Order No. 41 was unconstitutional, invalid, unenforcible and contrary to the provisions of the Agricultural Marketing Agreement Act of 1937, and that the Court erred in sustaining plaintiff's motion to strike defendant's fourth (4th) to eleventh (11th) defenses, both inclusive (R. 259-261). The Circuit Court of Appeals affirmed the judgment of the

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[5] Section 8c(9) of said Act, in effect provides that no order shall *become effective* unless it shall be approved by at least two-thirds of the producers.

trial Court, but in view of its decision did not deem it necessary to discuss the errors assigned on the cross-appeal, (R. 274) and dismissed the cross-appeal (R. 275). The failure of the lower court to consider the errors relied upon and urged on cross-appeal and in dismissing the cross-appeal is the subject matter of this cross-petition.

Specification of Errors to Be Urged.

The Circuit Court of Appeals erred in refusing to consider the errors, and each of them, relied upon by cross-petitioner in its cross-appeal in that court, and in dismissing said cross-appeal.

Specifically, the Circuit Court of Appeals erred:

1. In failing to find that the District Court should have found from the uncontradicted evidence and the law that Order No. 41 was not in compliance with the law and that all conditions precedent to the effectiveness of said Order had not occurred and that said Order was therefore contrary to the provisions of the Act in question and therefore invalid and not enforcible.

2. In failing to find that the District Court erred in sustaining plaintiff's motion to strike defendant's Fourth (4th) to Eleventh (11th) Defenses, and each of them, filed by defendant to plaintiff's complaint.

3. In failing to hold that the case presented only a moot question, since Order No. 41 became ineffective during the pendency of the cause in the District Court.

Reasons for Granting the Writ.

The Circuit Court of Appeals did not deem it necessary, in view of its affirmance of the judgment, to discuss the errors assigned by this cross-petitioner on its cross-appeal and dismissed said cross-appeal.

The errors assigned on the cross-appeal involve the validity of the Agricultural Marketing Agreement Act of 1937 and Order No. 41 herein sought to be enforced. The cross-petitioner herein has been held not to be a "handler" within the provision of the Act and therefore not subject to the order in question. However, if there be any question as to the applicability of the Order to the cross-petitioner, then, and in such event, the validity of the Act and whether the Order conforms to the provisions of said Act and is valid and enforcible becomes of the greatest importance.

The questions herein involved have not heretofore been passed upon by the Supreme Court and should be settled by this Court.

CONCLUSION.

It is respectfully submitted that, for the reasons stated, this cross-petition for writ of certiorari should be granted in the event a writ of certiorari on the petition of the United States of America in the above entitled cause should be allowed.

ALVIN E. STEIN,
Attorney for Cross-Petitioner.

BRIEF IN SUPPORT OF CROSS-PETITION FOR WRIT OF CERTIORARI.

I.

The Court erred in finding contrary to the law and the evidence that the Order was promulgated by the Secretary in full compliance with the law and that all conditions precedent to the effectiveness of said Order have occurred.

This defense was made in defendant's second (2nd) defense (R. 84-87), and also in defendant's ninth (9th) defense (R. 96). The motion to strike the ninth (9th) defense was sustained by the trial Court on the ground that it was "superfluous" (R. 194).

It is fundamental that any order by the Secretary of Agriculture must conform to the provisions of the Act and all conditions precedent to the effectiveness of said order must have occurred.[1]

a. The Secretary did not give due notice and opportunity for a hearing upon Order No. 41 herein sought to be enforced.

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[1] The Supreme Court in *H. P. Hood & Sons* v. *United States*, 307 U. S. 588, 589 states the proposition concisely as follows:

> "The question is simply whether the statute was followed."

Notice and opportunity for a hearing is made a prerequisite to the issuance of an order by the Secretary under the Act.[2]

The defendant below introduced at the hearing of the cause defendant's Exhibits 1, 2, 3 and 4 which are admitted by the plaintiff to constitute *all* of the evidence upon which the Secretary made his findings and fixed the terms and provisions contained in the order. (Cross-Respondent's Brief below p. 21, R. 201).

The fact is that defendant's Exhibits 1, 2, 3 and 4 show that the hearing was had in connection with another marketing agreement and order proposed by Pure Milk Association and the Chicago Milk Producers Council, Inc., pro-

[2] Section 8c(3) of the Agricultural Marketing Agreement Act of 1937 provides: "* * * *he shall give due notice of and an opportunity for a hearing upon a proposed order.*"

Section 8c(4) provides: "*After such notice and opportunity for hearing,* the Secretary of Agriculture shall issue an order, if he *find* and *sets forth in such order,* upon the evidence introduced *at such hearing* (in addition to *such other findings as may be specifically required by this section*) that * * *."

Section 8c(9) provides: "Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers * * * to sign a marketing agreement relating to such commodity or product thereof, *on which a hearing has been held,* the Secretary of Agriculture, with the approval of the President, determines: * * *."

Section 8c(10) provides: "*No order shall be issued* under this section *unless* it regulates the handling of the commodity or product covered thereby in the same manner as and is made applicable *only to persons* in the respective classes in the industrial or commercial activity specified in, a marketing agreement *upon which a hearing has been held.*"

Section 8c(17) requires "that notice of a hearing upon a proposed amendment to any order issued pursuant to Section 8c, *given not less than three days* prior to the date fixed for such hearing, shall be deemed notice thereof."

viding for a marketing area covering a large territory including many counties and townships in Illinos and a number of townships in Indiana. The terms and conditions of the proposed order differed materially from Order No. 41.[3]

Order No. 41 was promulgated without a public hearing or notice or opportunity for a hearing to producers or handlers of the product and in violation of Sections 8c(3), 8c(4), 8c(9), 8c(10) and 8c(17) and is therefore void.

b. Order No. 41 never became legally effective because the required approval of producers was never properly secured.

Under Section 8c(9) an order can only become effective in the event that at least two-thirds of the producers approve or favor the order. Section 8c(19) provides for a referendum to ascertain if the total number of producers represented in such referendum approving or favoring is equal to or in excess of the percentage required under such provision.

The uncontradicted evidence shows that the referendum conducted by the Secretary was not a referendum of all of the producers as required under Sections 8c(9) and 8c(19) but that only a portion of the producers were notified and requested to participate in the referendum.[4]

c. The order is void on ITS FACE in failing to comply with Sections 8c(4) and 8c(9) of the Act.

A determination by the Secretary, which is made a condition precedent to the effectiveness of the order, must by reason of the positive provisions of the Act[5] be *found* as a fact by the Secretary and *set forth in such order.*

The finding of the Secretary recited in the order (R. 9) that over sixty-seven (67%) per cent of the producers

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[3] See Defendant's Exhibit 3, pp. 3, 5.

[4] See affidavit of Mr. Connor, Referendum Agent (R. 115) and testimony of Mr. Krueger (R. 220, 221).

[5] Sections 8c(4) and 8c(9).

"voting in a referendum had approved or favored the order" does not comply with the provisions of the Act which requires a determination that more than two-thirds of the producers who, during such representative period, had been engaged in the production of such commodity for sale in the marketing area approved or favored the order. All of the producers entitled to vote did not participate in the referendum, and the finding that sixty-seven (67%) per cent of the number *voting* favored the order is not a compliance with the Act, since said sixty-seven (67%) per cent of those voting may actually constitute but a small percentage of the total number of producers who were entitled to vote in the referendum.

d. The order is contrary to the express provisions of Section 8c(5)G of the Act and other provisions thereof and illegally delegates legislative authority to the Market Administrator and others in violation of the Federal Constitution.

This defense is specifically set forth in the Fourth Defense of defendant's Answer and is also included in the denial contained in the Second Defense.

In Section 2 of the Act [6] Congress in declaring the policy of Congress expressly *prohibits* any action under said title

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[6] "(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this title, to establish and maintain such orderly marketing conditions for agricultural commodities *in interstate commerce*, as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period; * * * The base period in the case of all agricultural commodities except tobacco and potatoes shall be pre-war period, August 1909-July 1914. In the case of tobacco and potatoes, the base period shall be the post-war period, August 1919-July 1929.

"(2) *To protect the interest of the consumer* by * * * (b) *authorizing no action* under this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish *in subsection* (1) *of this* section."

which in any wise contravenes the declared policy and limitations in said section provided.

It follows that any order promulgated by the Secretary of Agriculture in violation of this section is not authorized by law and is clearly void.

Under Section 8(e) it is provided that if the Secretary *finds and proclaims* that, as to any commodity specified in such marketing agreement or order, the purchasing power during the base period specified for such commodity in Section 2 cannot be satisfactorily determined from available statistics of the Department of Agriculture, the base period, for the purposes of such marketing agreement or order, shall be the post-war period, August 1919-July 1929, or all that portion thereof for which the Secretary *finds and proclaims* that the purchasing power of such commodity can be satisfactorily determined from available statistics of the Department of Agriculture.

It will be noted that under this section, the Secretary of Agriculture is required to *find in the order* that the purchasing power, during the base period specified for such commodity in Section 2, cannot be satisfactorily determined from available statistics of the Department of Agriculture, and if he does so, he may then use the post-war period, August 1919-July 1929.

This finding must be set forth in the order as being one of the findings specifically required in addition to those specified in Section 8c(4).

While the order recites that the Secretary has found and proclaimed the period August 1919-July 1929 to be the base period to be used in determining the purchasing power of milk sold in the Chicago, Illinois Marketing Area (R. 10), we find no finding, as required by Section 8c(4) and Section 8(e), that the purchasing power during the base period specified for milk in Section 2 of said Act cannot

be satisfactorily determined from vital statistics of the Department of Agriculture.

We submit that the order is void for this reason.[7]

The requirement on the part of the Secretary to make a finding and proclamation only in the event that statistics are not available in the Department of Agriculture so that the purchasing power during the base period could not be satisfactorily determined, is a material and not a mere technical requirement.

However, we believe that there was a cogent reason why the Secretary did not, in his finding, state that there were no available statistics in the Department of Agriculture, as required by law, because the evidence submitted at the hearing on the proposed order of the Pure Milk Association, et al., showed that the United States Department of Agriculture had the necessary data in its possession and in fact, offered the same in evidence at the hearing thereof.[8]

We submit that in the absence of a showing and proper finding by the Secretary that the statistics are not available as required by Section 8(e) the order is void and is not authorized by and contrary to Section 2 of said Act.

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[7] In *H. P. Hood & Sons* v. *United States*, 307 U. S. 588, 595, the Supreme Court said:

> "Ordinarily the base period of section 2 is to be used. It is *only after a finding* that the purchasing power of the commodity during the period fixed in section 2 cannot be satisfactorily determined from available statistics of the Department of Agriculture, that the Secretary, by section 8e, is authorized *to find* and *proclaim* the post-war period." (Italics ours.)

[8] See United States Department of Agriculture "Exhibit 2" offered in evidence at the hearing and incorporated in defendant's Exhibit 1 herein, Tables 1 to 9, both inclusive, which shows that the Department of Agriculture had the necessary statistics in its possession.

II.

The District Court committed prejudicial error in striking Defendant's Fourth to Eleventh Defenses, both inclusive.

1. The Fourth Defense.

This defense was discussed under point I, d., (*supra*).

2. The Fifth Defense.

The Fifth Defense alleges that the Act is unconstitutional and void in that it delegates to the Secretary legislative powers contrary to Article I, Section 1, and Article I, Section 8, paragraph 18 of the Constitution of the United States, and that Order No. 41 promulgated thereunder is therefore void and unenforceable.

By Section 8c(18) of said Act, Congress delegated to the Secretary of Agriculture authority to fix such prices to producers of milk as he finds in his opinion will reflect the price of feeds, the available supply of feeds, and other market conditions which affect market supply and demand for milk and its products in the marketing area, insure a sufficient quantity of pure and wholesome milk, and be in the public interest, and "*thereafter, as the Secretary finds necessary*" on account of changed circumstances, *he shall*, after due notice and opportunity for hearing, "*make any adjustments in such prices.*"

We submit that this power is practically *without limitation* and may be in utter disregard of the express declaration of the policy to Congress as expressed in Section 2 of said Act and without regard to the interests of the handler of the product and of the consumer, and authorizes the Secretary to fix high and exorbitant prices of milk to farmers and compel handlers of milk to pay said high

and exorbitant prices irrespective of the base period mentioned and provided for in said Acts.

By Section 10(c) of said Act, Congress delegated to the Secretary of Agriculture *unlimited authority*, with the approval of the President, to make such regulation with the force and effect of law as may be necessary to carry out the powers vested in him by said title, and provided that any violation of any regulation shall be subject to such penalty, not in exess of $100, as may be provided therein.

This point was not directly passed upon by the Supreme Court in *United States* v. *Rock Royal Co-Operative Inc.*, 307 U. S. 533, 557, 574. Nothing was there said about the unlimited provisions permitting the Secretary after having fixed the prices based upon the evidence produced at the hearing to "thereafter, as the Secretary finds necessary," "make any adjustments in such prices" nor as to the power of the Secretary to enact regulations "with the force and effect of law" as provided by Section 10(c) of the Act.

The language of the dissenting opinion in *United States* v. *Rock Royal Co-Operative, Inc.*, 307 U. S. 582, is particularly true and applicable to the points raised herein and not passed upon by the Supreme Court.[9]

3. The Sixth Defense.

The Sixth Defense asserts that the Act is invalid as being in conflict with the anti-trust laws of the United

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[9] "A cursory examination of the statute shows clearly enough the design to allow a Secretary to prescribe according to *his own errant will* and then to execute. *This is not governed by law but* by caprice. *Whimseys may displace deliberate action* by chosen representatives and become rules of comment. To us the outcome seems wholly incompatible with the system under which we are supposed to live." (Italics ours.) *United States* v. *Rock Royal Co-Operative, Inc.*, 307 U. S. 553, at page 582.

States in that said Order promulgated under said Act creates, fosters and provides for an unlawful monopoly, pool, trust, combination and confederation among producers and handlers of milk who participate therein to regulate and fix the price of milk to farmers; that said order is expressly contrary to the provisions of Sections 1 and 2 of an Act of Congress of July 2nd, 1879, c. 647, 26 Stat. 209 (15 U. S. C. A. Commerce and Trade) and Section 13 (15 U. S. C. A.), and other Acts of Congress, being some of the antitrust laws enacted by Congress; that the enforcement of said Order against this defendant would subject this defendant to criminal prosecution under Federal laws, prohibiting engaging in any such combination or conspiracy for the purpose of fixing prices of commodities, and that said Order No. 41 is therefore illegal and void.

We submit that the proceedings herein are an effort by the Secretary of Agriculture to compel the defendant, *who is engaged purely in intrastate business, and therefore subject to State control,* to participate in this illegal pool or combination which, under the Sherman Anti-Trust Act, would make the defendant a participant and subject to its penalties. While the Act contains provisions exempting marketing agreements, Section 8(b) and Section 3(d) of the Act, such provisions do not apply to orders and, therefore, no such exemption exists with regard to Order No. 41.

Whenever Congress entered the field of price fixing, in the past, it has inserted a provision in the respective Acts exempting persons who participate therein from the provisions of the antitrust laws of the United States. This was true in the case of *National Industrial Recovery Act,* June 16, 1933 (Title 15 U. S. C. A. Sec. 701) the *Bituminous Coal Act,* April 26, 1937, (Title 15, Sec. 832(d), the *Motor Carrier Act,* of 1935, as amended (Title 49, Sec. 313(f)), and others.

We submit that in the absence of some such provisions exempting the producers and handlers of milk from complying with the order, the handlers would nevertheless be subject to Federal prosecution under the antitrust laws and the knowledge and acquiescence of the Federal Government would be no defense thereto.[10]

4. The Seventh Defense.

This defense (R. 93) presents the same question as applied to the State Anti-Trust Laws of Illinois as the one discussed under the Sixth Defense (Point II, 3, supra), and the argument there made is equally applicable. The fact that defendant is engaged entirely in intrastate business and therefore subject to local State control emphasizes the importance of our contention. Congress could have inserted an exemption both as against "State or Federal" antitrust laws, as it did in the *Motor Carrier Act*, but it did not see fit to do so.

The Courts cannot legislate for Congress and supply a provision presumably intentionally omitted by Congress.

5. The Eighth and Ninth Defenses.

These defenses have been argued under Point I, a., b. and c., supra.

6. The Tenth Defense.

This defense (R. 97), alleges that said order is unlawful, discriminatory, unreasonablbe, void and contrary to the Act in that the Secretary arbitrarily designated in Sec. 941.1(1) of said order the cities, towns and villages of Chicago, Evanston, Wilmette, Kenilworth and Glencoe as the "Chicago, Illinois Marketing Area", and arbitrarily

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[10] See *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 225. And see footnote 60 appended to this opinion in 84 L. Ed. p. 1170.

omitted from said marketing area other cities, towns and villages marketing milk under the same or similar circumstances and located in the same County and State adjoining the City of Chicago, or in its vicinity, such as Oak Park, Berwyn, Cicero, and others.

It was alleged in the Tenth Defense of defendant's answer (R. 97) that the prices which handlers are compelled to pay producers under Order No. 41 are considerably higher than handlers pay producers for said commodity for sale other than in said marketing area designated by said Order No. 41 in cities, towns and villages in the immediate vicinity of Chicago and said marketing area, such as Oak Park, and others; that handlers of milk engaged in the Chicago, Illinois Marketing Area, who are compelled to comply with Order No. 41, would be discriminated against and be unable to compete with unregulated milk in other adjoining areas under the same or similar conditions, and thereby be deprived of their constitutional rights to engage in their lawful occupation in the State of Illinois except at great loss and irreparable damage.

The merit in defendant's contention was recognized by the Secretary of Agriculture in the order promulgated by the Secretary, effective July 1st, 1940, wherein the marketing area is enlarged to include the village of Oak Park. (See Sec. 941.1(a)(1) of said order, as amended, (R. 122).)

In view of the express provisions contained in Section 8(c)(11)B of said Act, providing that the marketing area in the case of milk and its products shall not be the smallest regional production area or regional marketing area, or both, this question is taken out of the realm of administrative policies over which the Secretary of Agriculture has exclusive jurisdiction, but makes it a question of law for the courts to determine whether or not the order as promulgated by the Secretary actually complies with the requirements of the Acts of Congress, which are mandatory.

It is further urged by cross-respondent that the District Court correctly sustained the motion to strike this defense, *as in any event* there was no prejudicial error in such ruling because the evidence before the Secretary, which was included in defendant's exhibits 1, 2, 3 and 4, was admitted in evidence at the final hearing.

We submit that a careful examination of defendant's exhibits 1 to 4 fails to disclose any competent evidence which warranted such finding on the part of the Secretary.

The fact however is that there was *no hearing* on the *proposed order*, as heretofore shown, *and no opportunity* given to any of the parties to produce evidence to show the harmful effect of such arbitrary designation of territory by the Secretary. The area finally designated by the Secretary as the marketing area was not known at the time of the hearing by the handlers or producers and presumably included competing territory subsequently arbitrarily omitted. The area was arbitrarily and capriciously designated by the Secretary in violation of the Act without a hearing and without competent evidence to support it, and the order is therefore contrary to provisions of the Act and void.

7. The Eleventh Defense.

The Eleventh Defense (R. 97) sets forth that the order is unenforcible, discriminatory, unreasonable and void in that it is contrary to the declaration of conditions and declaration of policy of Congress as set forth in Section 1 and Section 2 of said Act for the reasons therein set forth.

Cross-respondent contends that the Courts are not concerned with the wisdom and economic policy of a regulation imposed under legislative enactment.

Such has been the ruling of the Supreme Court. However, we contend that in view of Sections 1 and 2 of said

Act and the express limitation therein "authorizing no action" under said title contrary to the declared policy of Congress, it is the duty of the Courts to determine the validity of all orders promulgated by the Secretary to ascertain whether such action was in conformity with the declared policy of Congress, and whether such action was, in fact, authorized by law.

The motion to strike admitted the facts in said defense alleged, which facts showed a condition created by said order in violation of the declared policy of Congress. The motion to strike should have been denied.

8. The Twelfth Defense.

This defense alleged (R. 118-141) that during the pendency of said cause, the Secretary had promulgated an Order No. 41, as amended, to regulate the handling of milk, effective July 1st, 1940, in substitution of Order No. 41 herein sought to be enforced. (Compare Order No. 41 (R. 8-22) with the substituted order (R. 120-141).) Plaintiff admitted the issuance of said amended order in its supplemental motion for summary judgment (R. 144, 145).

Order No. 41, as amended, does not preserve existent rights under Order No. 41. The amended order covers the whole subject of Order No. 41, embraces new and different provisions, and plainly shows that it was intended not only as a substitute for the earlier order but to cover the whole subject. The amended Order clearly repealed the former Order.[11]

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[11] *Murphy* v. *Utter*, 186 U. S. 95, 105.
The Paquete Habana, 175 U. S. 677, 685.
United States v. *Tynen*, 11 Wallace, 88, 95, 20 L. Ed. 153, 155.

The case now presents only a moot question.[12]

Respectfully submitted,

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[12] *City of Paducah* v. *Paducah Water Co.*, 258 F. 20, 22.
Berry v. *Davis*, 242 U. S. 468.
W. Ames & Co. v. *Wallace*, 81 F. (2d) 414.
Selected Products Corp. v. *Humphreys*, 86 F. (2d) 821 (C. C. A. 7th).